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9 Attorneys for Plaintiff  
10 JOBY, INC.

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION  
14

15 JOBY, INC.,

16 Plaintiff,

17 v.

18 TOCAD AMERICA, INC.,

19 Defendant.  
20

Case No. 3:07-CV-06455 (SI)

**DECLARATION OF VIRGINIA K.  
DEMARCHI IN SUPPORT OF JOBY,  
INC.'S MOTION FOR A  
PRELIMINARY INJUNCTION**

**Date: May 2, 2008**  
**Time: 2:00 p.m.**  
**Courtroom: 10, 19th Floor**  
**The Honorable Susan Illston**

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22  
23 I, Virginia K. DeMarchi, declare as follows:

24 1. I am partner with the law firm of Fenwick & West LLP and counsel to plaintiff  
25 Joby, Inc. ("Joby"). I make this declaration based upon my personal knowledge, and if called  
26 upon to testify, could and would testify competently to the matters set forth below.

27 2. Attached hereto as Exhibit A is a true and correct copy of the report available from  
28 the LexisNexis service regarding the Delaware Secretary of State filing for Tocad America, Inc.

1           3.       Attached hereto as Exhibit B is a true and correct copy the current home page on  
2 Tocad's website, www.tocad.com.

3           4.       Attached hereto as Exhibit C is a true and correct copy of the Business Information  
4 Report for Tocad America, Inc., available from Dun & Bradstreet on March 20, 2008.

5           5.       On April 7, 2007, Joby received a letter from Michael Warnecke, counsel for  
6 Tocad. Mr. Warnecke threatened legal action for what he perceived were false allegations by  
7 Joby concerning its intellectual property rights. A true and correct copy of this letter is attached  
8 hereto as Exhibit D.

9           6.       On April 18, 2007, my colleague Charlene Morrow responded to Mr. Warnecke's  
10 letter of April 7. A true and correct copy of this letter is attached hereto as Exhibit E.

11          7.       On June 14, 2007, Ms. Morrow again wrote to Mr. Warnecke to inform him that  
12 several of Tocad's retailers were using images of Joby's Gorillapod to sell Tocad's tripod, and to  
13 demand an end to this activity. A true and correct copy of this letter is attached hereto as  
14 Exhibit F.

15          8.       In a letter to Ms. Morrow on July 10, 2007, Mr. Warnecke denied Tocad's  
16 responsibility for or control over the activities of its retailers. A true and correct copy of this  
17 letter is attached hereto as Exhibit G.

18          9.       On September 6, 2007, Ms. Morrow again wrote to Mr. Warnecke regarding  
19 Tocad's and its distributors' and retailers' use of images of the Gorillapod in connection with  
20 advertisements for the FlexPod. A true and correct copy of this letter is attached hereto as  
21 Exhibit H.

22          10.       On October 1, 2007, my colleague Rachael Samberg sent a letter to Photographic  
23 Research Organization, Inc. ("PRO"), a retailer that carries the Tocad FlexPod, demanding that  
24 PRO cease marketing and selling the FlexPod. Ms. Samberg noted that the FlexPod infringed on  
25 Joby's trade dress rights and Joby's rights against unfair competition. A true and correct copy of  
26 this letter is attached hereto as Exhibit I.

27          11.       On October 3, 2007, Ms. Morrow again wrote to Mr. Warnecke and informed him  
28 that Joby would be willing to confer about Tocad designing around the Joby portfolio of patents

1 and other rights. A true and correct copy of this letter is attached hereto as Exhibit J.

2 12. On October 4, 2007, Mr. Warnecke wrote to Ms. Samberg and Ms. Morrow in two  
3 separate letters. In the letter to Ms. Morrow, Mr. Warnecke complained about having received  
4 two letters from my firm – one addressed to PRO and one addressed to Tocad. In neither letter  
5 did Tocad agree to or propose any modifications of its product design to avoid confusion with the  
6 Gorillapod. True and correct copies of these letters are attached as Exhibit K and Exhibit L to  
7 this declaration.

8 13. On December 21, 2007, following Tocad's release of the FlexPod Plus, I wrote a  
9 letter to Mr. Warnecke informing him of the publication of Joby's patent applications and  
10 enclosing a courtesy copy of Joby's complaint for trade dress infringement and unfair competition  
11 in this matter. A true and correct copy of this letter, without the complaint, is attached hereto as  
12 Exhibit M.

13 14. At Tocad's request, Mr. Warnecke and I arranged a meeting to discuss whether it  
14 would be possible to resolve Joby's complaint without further litigation. The parties and their  
15 counsel met to discuss the dispute in mid-February of 2008. Counsel for the parties have engaged  
16 in extensive correspondence and telephone communications since that meeting, in an attempt to  
17 achieve a satisfactory resolution to the dispute. Those efforts failed and settlement discussions  
18 ended on March 14, 2008.

19 15. Attached hereto as Exhibit N are images showing a flexible monopod downloaded  
20 from the web site [http://www.twistipod.com/tpod\\_files/pics/pics.htm](http://www.twistipod.com/tpod_files/pics/pics.htm), and a flexible tripod  
21 downloaded from the web site <http://images.aandhmarketing.com/pics/topbrand/hqafmt.jpg>.

22 16. Attached hereto as Exhibit O is a collection of images obtained from a search of  
23 "Google Images" (<http://images.google.com>) using the search terms "ball and socket."

24 17. Attached hereto as Exhibit P is a copy of the first 10 results returned from a search  
25 of the Google web site using the search terms "flexible tripod."

26 18. Attached hereto as Exhibit Q is a screen capture from the web site  
27 [www.windthefrog.net](http://www.windthefrog.net) showing a posting on February 13, 2008, captioned "Gorilla Pod Test."

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1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct, and that this declaration was executed this 28th day of March, 2008,  
3 in Mountain View, California.

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5 /s/ Virginia K. DeMarchi  
6 Virginia K. DeMarchi  
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FENWICK & WEST LLP  
ATTORNEYS AT LAW  
MOUNTAIN VIEW